

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1082 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : YES
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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RAMESH VALLABHBHAI LUHANA

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 1082 of 2001
MR ANIL S DAVE for Petitioner No. 1
MS BANNA S DUTTA for Petitioner No. 1
Mr. H.L. Jani, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 11/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Dave for the petitioner and Mr. Jani, learned AGP for the respondent State. In this petition, the petitioner has challenged the impugned order of detention dated 19th December, 2000 passed by the detaining authority under section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("the PASA Act" for short). The grounds of detention have been communicated to the petitioner under section 9(1) of the PASA Act and the petitioner has been detained at Vadodara Jail as Class II Detenu. As per the

grounds of detention, the petitioner has been involved in seven registered offences and the date of the last offence registered against the detenu is 7th November, 2000. The statements of the secret witnesses as recorded on 13.12.2000 were verified by the detaining authority on 14.12.2000. As per the grounds of detention communicated to the detenu, the detenu has been involved in two unregistered offences dated 15.10.2000 and 23.9.2000. As per the grounds of detention, at the time of passing of the impugned order of detention, the detenu was in judicial custody in respect of the offence registered at Sr. No.3. There was, therefore, no material available with the detaining authority to form apprehension that the petitioner is likely to be released by the competent court on bail in connection with the said offence. As per the representation dated 29.1.2001 made by the petitioner, he has made a request to supply certain documents as per para 3 of the representation at page 40. As per the communication dated 19.2.2001, the detaining authority has given reply to the detenu that the statements of the co-accused Pankaj Babu and Ravji Kala Rathod have been supplied to the petitioner but all the statements have not been supplied as demanded by the petitioner. In this petition, the respondents have not filed any reply.

2. Learned advocate Mr. Dave has raised various contentions while challenging the impugned order of detention. However, according to him, two contentions are enough for setting aside the impugned order of detention. He has submitted that at the time of passing the impugned order of detention, the petitioner was in judicial custody in respect of the offence at Sr.No.3 and there was no cogent material available with the detaining authority to believe that the petitioner will be enlarged on bail by the competent court. Therefore, in absence of such material, detaining authority is not justified in detaining the petitioner while in custody. He has submitted that the detaining authority has passed the impugned order of detention in mechanical manner. He has relied upon the following decisions:

1. Ramesh Yadav versus District Magistrate and another (supra) reported in 1985 (4) SCC 232
2. Amrutlal and others versus Union of India reported in 2000(1) SCC 341.
3. Rivadeneyta Ricardo Augustin versus Government of the National Capital Territory of Delhi and others reported in 1994 SCC (Cri) 354.

In case of Ramesh Yadav v. District Magistrate and another (supra), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offences registered against him. There is no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail and to indulge in the same activities again after release on bail.

In case of Rivadeneyta Ricardo Augustin (supra), the apex court has held as under in para 4 :

"4. Though several grounds are urged in support of the writ petition by Shri Ram Jethmalani, learned counsel for the petitioner, it is not necessary to refer to all of them except one of which, in our opinion, merits acceptance. It is submitted that on the date the order of detention was made the petitioner was in judicial custody. The bail petitions filed by him were dismissed finally on June 9, 1992. He did not move any bail application thereafter. No bail application was pending on August 18, 1992. There was no other circumstance indicating that

the petitioner would be released from custody. In these circumstances, there was no material before the authority to believe that there was a real possibility of the petitioner being enlarged on bail or being released and that it is necessary to detain him to prevent him from engaging in prejudicial activity. It is pointed out that according to the counter, proposal for the detention was sent to the Administrator on May 22, 1992 but the authority passed the order only on August 18, 1992 without apprising himself of the fact situation prevailing in the middle of August 1992. Reliance is placed upon two decisions of this court in *Kamarunnisa v. Union of India* and *Hawabibi Sayed Hanif v. L. Hmingliana*. In the first case the principle relied upon by the learned counsel, is stated in the following words : (SCC pp.138-39)

'The decisions of this court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty. We will now consider the case-law in brief.

In *vijay Narain Singh* this Court stated that the law of preventive detention being a drastic and hard law must be strictly construed and should not ordinarily be used for clipping the wings of an accused if criminal prosecution would suffice. So also in *Ramesh Yadav v. District Magistrate, Itah*, this court stated that ordinarily a detention order should not be passed merely on the ground that the detenu who was carrying on smuggling activities was likely to be enlarged on bail. In such cases the proper course would be to oppose the bail application and if granted, challenge the order in the higher forum but not circumvent it by passing an order of detention merely to supersede the bail order. In *Suraj Pal Sahu v. State of Maharashtra*, the same principle was reiterated. In *Binod Singh v. District Magistrate, Dhanbad*, it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the

power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the detention order for inferring that the detenu was likely to be released on bail. This inference must be drawn from material on record and must not be the ipse dixit of the officer passing the detention order. Eternal vigilance on the part of the authority charged with the duty of maintaining law and order and public order is the price which the democracy in this country extracts to protect the fundamental freedom of the citizens. This Court, therefore, emphasized that before passing a detention order in respect of the person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail the material on record reveals that he will indulge in prejudicial activity if not detained. "

In case of *Amratlal and others versus Union of India* (supra), the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the offences registered against the petitioner under the I.P.C.

There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority, subjective satisfaction is not established, looking to the facts of the present case.

However, learned advocate Mr. Jani has relied upon the decision of the division bench of this court reported in 1988 (2) GLH 475 in case of Nasimbanu. Now, this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Mr. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

The second contention raised by Mr. Dave is to the effect that inspite of the demand made by the petitioner by representation dated 29th January, 2001, copies of the statements recorded by the IO in respect of the registered offence under section 161 of the Code have not been supplied to the petitioner though reply dated 19.2.2001 has been given informing that the statements in respect of the co-accused have been supplied but except that, no other statements have been supplied. He has submitted that the petitioner has raised specific contention in this regard at para 20 and 24 of the petition. Para 20 reads as under:

"20. The petitioner states and submits that
the detaining authority was duty bound to supply
the statements of the witnesses recorded u/s.161
of the Cr.P.C. in all the seven cases which are

pending investigation. It is further submitted that the detenu does not know whose statements are recorded by the police officer during the course of investigation in the aforesaid offences, and therefore, all the statements were relied has not been placed by the detaining authority are also required to be supplied to the detenu under sec.161 of the Cr.P.C.1973 at the time of communication of grounds of detention, but in the instant case, said materials have not been supplied to the detenu, and, therefore, he could not make an effective representation under Art. 11(5) of the Constitution of India. It is further submitted that the sponsoring authority was also duty bound to place all the statements of witnesses under sec. 161 of the Cr.P.C. 1973 before the detaining authority so that some balance can be maintained for arriving at the subjective satisfaction by the respondent No.1, and, therefore, in absence of these important and vital documents, the subjective satisfaction of the respondent no.1 gets vitiated and the impugned order of detention requires to be quashed and set aside.

Para 24 reads as under:

"The petitioner states and submits that in the representation dated 19.1.2001, the advocate of the petitioner detenu demanded certain vital documents like proposal, statements of witnesses recorded under sec.161 of Cr.P.C. 1973 during the course of investigation and further murramal recovery panchanama in the case registered at sr.no.2 and further it is also demanded to supply the panchanama of identification parades of all the seven registered cases which are pending investigation but so far neither the detaining authority nor the respondent no.2 has supplied the aforesaid documents to the detenu for making an effective representation. It is also submitted that by way of representation, the advocate also demanded bail application and bail order of the co accused in the grounds of detention of co accused, if they are detained under PASA Act but so far there is no intimation to the petitioner detenu and, therefore, it is infringement of Art. 22(5) of the Constitution of India and, therefore also, the impugned order of detention of the petitioner detenu requires to

be quashed and set aside."

Learned advocate Mr. Dave for the petitioner has submitted that the respondents have not controverted the aforesaid specific contentions raised by the petitioner by filing their affidavit in reply and these contentions have, thus, remained unchallenged, uncontroverted and, therefore, the impugned order of detention is required to be quashed and set aside on this ground also. In support of this contention, learned advocate Mr. Dave has placed reliance upon the decision of the apex court reported in AIR 1982 SC 696, in case of Mohd. Zakir v. Delhi Administration and others. Relevant observations made in para 2 of the report are as under:

"It is the constitutional mandate which requires the detaining authority to give the documents relied on or referred to in the order of detention pari passu the grounds of detention in order that the detenu may make an effective representation immediately instead of waiting for the documents to be supplied with. It is manifest that question of demanding the documents is wholly irrelevant. The infirmity in this regard is violative of constitutional safeguard enshrined in Art. 22(5) of the Constitution. AIR 1980 SC 1983 and AIR 1981 SC 314."

In view of the observations made by the apex court in the aforesaid decision and also in the facts and circumstances of the case, according to my opinion, the impugned order of detention is required to be quashed and set aside.

In the result, this petition is allowed. Impugned order of detention dated 19th December, 2000 passed by the detaining authority is quashed and set aside. The petitioner detenu Rameshbhai Vallabhai Luvana who has been detained in Baroda Jail is ordered to be released forthwith if he is not required in any other case. Rule is made absolute accordingly with no order as to costs. DSP.

11.7.2001. (H.K.Rathod, J.)

Vyas